U.S. Department of Labor Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

ADMINISTRATOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

PROSECUTING PARTY,

v.

MORTON CONCESSIONS, INC.,

RESPONDENT.

ARB CASE NO. 2024-0043

ALJ CASE NO. 2020-TNE-00056
ALJ PATRICK M. ROSENOW

DATE: May 14, 2026

Appearances:

For the Administrator, Wage and Hour Division:
Emily H. Su, Esq.; Jennifer S. Brand, Esq.; Sarah Kay Marcus, Esq.; Sara A. Conrath, Esq.; and James M. Morlath, Esq.; *U.S. Department of Labor, Office of the Solicitor*; Washington, District of Columbia

For the Respondent:
R. Wayne Pierce, Esq.; *The Pierce Law Firm, LLC*; Annapolis, Maryland

Before JOHNSON, Chief Administrative Appeals Judge, and KAPLAN, BURRELL, and KIKO, Administrative Appeals Judges

NOTICE OF REFERRAL TO THE SECRETARY OF LABOR

This case arises under the Equal Access to Justice Act (EAJA or the Act), and its implementing regulations.[1] EAJA allows prevailing parties to recover attorney's

[1] 5 U.S.C. § 504; 29 C.F.R. Part 16 (2025).

fees and costs from the federal government in cases involving an "adversary adjudication," in which the government's position is not "substantially justified."[2]

On April 9, 2026, the Administrative Review Board (ARB or Board) issued a Decision and Order (D. & O.) in this case. The narrow question presented was whether EAJA allows an eligible employer to recover attorney's fees and costs when prevailing against the government in an enforcement action brought under the H-2B provisions of the Immigration and Nationality Act (H-2B and INA, respectively), as amended, and its implementing regulations.[3]

The Department of Labor addressed the same question in a prior proceeding, *Administrator, Wage and Hour Division, U.S. Department of Labor v. Graham and Rollins, Inc. (Graham & Rollins)*. There, the Administrative Law Judge (ALJ) determined that H-2B proceedings were "adversary adjudications" under EAJA, and thus the Department could be liable for attorney's fees.[4] The Administrator appealed to the ARB, which agreed with the ALJ and held that EAJA applied to these proceedings.[5] On review, though, the prior Acting Secretary of Labor, Julie Su

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[2] The statute, in relevant part, provides: "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a).

[3] 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(14). The statute's implementing regulations are found at 20 C.F.R. Part 655, subpart A (2025), with additional enforcement regulations at 29 C.F.R. Part 503 (2025).

[4] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc.*, ALJ No. 2018-TNE-00022, slip op. at 3-4 (ALJ May 19, 2021) (Recommended Decision and Order Awarding Attorney's Fees). In that case, the Administrator of the Wage and Hour Division (Administrator) initiated an H-2B enforcement proceeding for violations that allegedly occurred more than half a decade prior. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc.*, ALJ No. 2018-TNE-00022, slip op. at 1-2 (ALJ June 26, 2018) (Decision and Order Granting Employer's Motion to Dismiss and Order Cancelling Hearing and Order Dismissing Case). The employer opposed the action on the grounds that the enforcement proceeding was not brought within five years as required by the statute of limitations. *Id.* at 2. The Administrator countered that no statute of limitations existed for the violations. *Id.* The ALJ disagreed with the Administrator and dismissed the action. *Id.* at 12.

[5] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc. (Graham & Rollins (ARB))*, ARB No. 2021-0047, ALJ No. 2018-TNE-00022 (ARB Dec. 22, 2022) (Decision and Order Affirming in Part and Reversing in Part). One Member disagreed with the Board's Majority.

(Acting Secretary), diverged from the opinions of both the ALJ and the ARB and determined that such proceedings do not constitute "adversary adjudications."[6] Both the ARB's decision and the Acting Secretary's decision focused on, in sum, the question of whether the phrase "on the record" must be expressly included in the H-2B program authorizing statute for EAJA to apply.

Under circumstances almost identical to those presented in *Graham & Rollins*,[7] the Department was again asked to determine whether EAJA applies to H-2B enforcement proceedings in this case. Because of the Acting Secretary's *Graham & Rollins* decision, the ALJ in this case was compelled to deny Respondent Morton Concessions, Inc.'s, request for attorney's fees under EAJA. Because the Board was likewise bound by the decision in *Graham & Rollins*, the Board affirmed the ALJ.

However, the Board took the opportunity to highlight its concerns with the *Graham & Rollins* decision and encouraged the Secretary of Labor to revisit the issue.[8] The Board emphasized that it did not make a recommendation to revisit or overturn a prior Secretary's decision lightly. Therefore, the Board provided a detailed supporting analysis explaining why the Board believed the *Graham & Rollins* decision was incorrectly decided.

On April 23, 2026, Morton Concessions filed a Petition for Secretarial Review (Petition), asking the Secretary to accept this case for review. In its Petition, Morton Concessions pointed to the "clear split on this issue" between the ARB and the previous Acting Secretary and explained why the "stridency of those good-faith," but conflicting opinions necessitated further review and consideration by the

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[6] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Graham & Rollins, Inc. (Graham & Rollins (Acting Secretary))*, ARB No. 2021-0047, ALJ No. 2018-TNE-00022 (Sec'y Aug. 9, 2023) (Final Agency Decision and Order).

[7] Once again, the Administrator pursued an enforcement action against an employer for violations that allegedly occurred more than half a decade prior, arguing that no statute of limitations existed for the violations. *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Morton Concessions, Inc.*, ALJ No. 2020-TNE-00056, slip op. at 1-3 (ALJ Apr. 12, 2021) (Ruling on Respondent's Motion to Dismiss). Once again, the ALJ dismissed the untimely claims. *Id.* at 8.

[8] Keith Sonderling currently serves as the Acting Secretary of Labor. For simplicity and to distinguish between Acting Secretary Su and Acting Secretary Sonderling, we will continue referring to Acting Secretary Su as "Acting Secretary" and Acting Secretary Sonderling as "Secretary."

current Secretary.[9] Morton Concessions also explained that the issue of recovery of attorney's fees and costs under EAJA in H-2B enforcement actions is "important and recurring."[10] Given the size of the H-2B program and cost for employers to comply with program requirements, "H-2B employers need the certitude that they will not be subjected to unjustifiable WHD prosecution."[11]

On May 4, 2026, the Administrator of the Wage and Hour Division (Administrator) filed an Opposition to Respondent's Petition for Review by the Secretary of Labor (Opposition). The Administrator argued that the Acting Secretary's decision in *Graham & Rollins* was correctly decided and that the Board's reasoning in the D. & O. in this case was wrong.[12] The Administrator also argued that applying EAJA to H-2B proceedings would have "a significant negative impact on the Department's enforcement of the H-2B program."[13] The Administrator asserted that applying EAJA to these proceedings would "require the Department to expend resources in cases in which it does not ultimately prevail on all claims because the Administrator would have to defend its position as substantially justified under EAJA."[14]

For the reasons below, the Board refers this matter to the Secretary for review.

STANDARD

The Secretary of Labor delegated to the Board the responsibility to hear appeals and issue decisions under enumerated statutes, Executive Orders, and regulations, including EAJA.[15] However, the Secretary retains the authority to review the Board's decisions and issue final agency decisions for the Department of Labor.[16]

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9 Petition at 1, 6.

10 *Id.* at 1.

11 *Id.* at 1-2.

12 Opposition at 5-14.

13 *Id.* at 14.

14 *Id.* at 15.

15 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020).

16 *Id.* at 13187-88, ¶6.

A party to a case before the Board may, within 14 calendar days after the Board issues its decision, request that the Board refer the case for further review by the Secretary.[17] The Board may refer the case to the Secretary if a majority of the Board determines that the case involves (1) a question of law, (2) that is of "exceptional importance," and (3) that warrants Secretary review.[18] If the Board refers the matter to the Secretary, the Secretary retains the discretion to decline, accept, or take no action on the Board's referral, as the Secretary deems appropriate.[19]

DISCUSSION

As stated above, EAJA allows prevailing parties to recover attorney's fees and costs from the federal government in cases involving an "adversary adjudication," in which the government's position is not "substantially justified."[20] For an agency proceeding to qualify as "adversary adjudication" and thus be subject to EAJA, three conditions must be met. First, the proceeding must be an "adjudication." Second, the adjudication must be required by statute to be determined "on the record." Third, the statute must provide an "opportunity for an agency hearing."[21] The disagreements between the parties, amici, the ARB, and the prior Acting Secretary in the *Graham & Rollins* decisions and in this case boil down to whether H-2B enforcement proceedings must be conducted "on the record."[22]

The H-2B statute at issue here provides, in relevant part, that if the Secretary of Labor "finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the petition to admit or otherwise provide status to a nonimmigrant worker under [the H-2B program] or a willful misrepresentation of a material fact in such petition," the Secretary may take appropriate remedial action.[23] Although the statute does not explicitly state

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17 *Id.* at 13188, ¶6(b)(1).

18 *Id.*

19 *Id.*

20 5 U.S.C. § 504(a).

21 D. & O. at 6-7.

22 There is no debate that this case involves an adjudication (EAJA prong one) and a hearing is required (EAJA prong three).

23 8 U.S.C. § 1184(c)(14).

that the hearing must be conducted "on the record," the parties, the ARB, and the previous Acting Secretary all agree that the absence of these "magic words" from the statute is not determinative.[24] The divergence comes instead in deciding whether, despite the absence of the words from the statute, Congress nevertheless intended the proceedings to be conducted "on the record." The ARB and the employers in both *Graham & Rollins* and this case assert that Congress intended for the proceedings to be conducted "on the record." The Administrator and the prior Acting Secretary assert that Congress did not intend for the proceedings to be conducted "on the record."

The relative ease with which we can identify the question presented belies the intense complexity of the issue, which is perhaps best represented by the sheer volume of pages devoted to the debate thus far. In the D. & O., the Board provided a detailed supporting analysis (including both a Majority opinion and a Concurring opinion) of 76 pages. The ARB's decision in *Graham & Rollins* was 48 pages, and the Acting Secretary's decision was 18 pages. In this appeal and in *Graham & Rollins*, the parties and amici spent more than 220 pages briefing the issue to the Board. In total, the parties, amici, the ARB, and the Secretary have spent more than 360 pages debating the issue, just at the appellate level. The amount of time and effort devoted to the issue signifies how contested the issue is, how important it is to the parties, the Administrator, and the Department of Labor, and why the Secretary should consider and definitively resolve the issue.

In the Petition and Opposition, Morton Concessions and the Administrator continue to debate the opposing interpretations of the H-2B statutory provision and

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[24] *See* D. & O. at 34. The Administrator ostensibly agrees with this black letter principle, which has been confirmed by the Supreme Court and numerous other federal courts. *Id.* at 31-32 & n.121; Opposition at 8. However, the Administrator's Opposition repeatedly emphasizes and almost exclusively focuses on the text of the H-2B statutory provision. *E.g.*, Opposition at 2 ("*Graham and Rollins* correctly analyzed the text of the H-2B enforcement provision . . . ."), 5 ("[P]ursuant to the text of the INA, H-2B proceedings are not the sort of 'adversary adjudications' to which EAJA applies."); 6 ("[C]ourts look only to the statutory text and read any ambiguity in favor of immunity . . . ."), 7 ("Based on a careful examination of the text . . . Congress did *not* clearly intend for such proceedings to be 'on the record' . . . ."), 9 ("[T]he Board focuses on legislative history and EAJA's purpose, rather than examining the text of the H-2B provisions . . . ."), 10 ("[T]he Board errs in failing to, and in fact faulting the Secretary for, closely examining the text of the H-2B provisions . . . ."), 11 ("Determining whether EAJA applies to H-2B proceedings therefore necessarily requires the close examination of the text of the H-2B enforcement provision . . . .").

the application of tools of statutory construction to discern congressional intent. We do not intend to restate the Board's position on the matter again here in full—the Board's decisions in *Graham & Rollins* and in this case speak for themselves and our reasoning is neatly summarized in the introduction on pages four to five of the D. & O. Suffice it to say, the matter remains intensely debated. The Board believes the previous Acting Secretary and the Administrator overly relied on sovereign immunity, which was clearly waived by EAJA, and failed to take into consideration the important purposes of EAJA;[25] the Administrator continues to rely seemingly decisively on principles of sovereign immunity.[26] The Board believes that the previous Acting Secretary disregarded nearly 80 years of legal precedent and guidance explaining that courts generally presume, absent evidence to the contrary, that Congress intends for traditional, quasi-judicial adjudications like these to be conducted "on the record"[27]; the Administrator rejects these presumptions and this history and suggests they are not evidence of congressional intent.[28] The Board does

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[25] D. & O. at 7-13, 23-31. The Opposition states that "the question is not whether EAJA contains a waiver of sovereign immunity, which is not in doubt. The question is whether EAJA's partial waiver of immunity *extends to H-2B enforcement proceedings*." Opposition at 10-11 (emphasis original). Because the Administrator agrees that sovereign immunity has doubtless been waived by EAJA, the relevant question is, more precisely, whether, even in the absence of the magic words "on the record," we can conclude that Congress intended the proceedings to be conducted on the record. The Acting Secretary conceded as much in *Graham & Rollins*. *Graham & Rollins (Acting Secretary)*, ARB No. 2021-0047, slip op. at 7 (stating that the absence of the words "on the record" from the statute "does not end the inquiry entirely, however," and stating that "courts use traditional tools of statutory construction to determine whether Congress intended to *require* full agency adherence to all section 554's procedural components for a particular administrative proceeding") (internal citation and quotations omitted). This analysis requires an examination of other indicia of congressional intent beyond just the text of the statute, including the nature of the proceedings and the longstanding presumptions about quasi-judicial adjudication discussed in the D. & O. *See* D. & O. at 35-41 (discussing caselaw). We therefore disagree with the Administrator's criticism of the Board for looking to the nature of the proceedings, the longstanding and well-established presumptions about quasi-judicial proceedings, and the legislative history when trying to determine congressional intent. Since EAJA already waives sovereign immunity, principles of sovereign immunity do not fundamentally alter this analysis. *See Dantran, Inc. v. U.S. Dep't of Lab.*, 246 F.3d 36, 45-47 (1st Cir. 2001) (concluding that a statute that did not expressly state proceedings were to be conducted "on the record" was still subject to EAJA upon examining congressional intent and the nature of the proceedings involved, regardless of the Secretary of Labor's arguments about sovereign immunity).

[26] Opposition at 5-6, 9-11.

[27] D. & O. at 35-45.

[28] Opposition at 11-12.

not believe that the inclusion or exclusion of particular language from a scattering of other provisions elsewhere in the immensely complex INA can or should detract from the presumption that Congress intended these types of proceedings to be conducted on the record[29]; the Administrator argues that a comparison of the H-2B provisions to selected other sections "strongly suggests" Congress intended to diverge from the baseline presumption that hearings like these would be conducted on the record.[30]

As the foregoing shows, there is a stark divide on this issue and we agree with Morton Concessions that the Secretary should review the issue. Only the Secretary can definitively resolve the matter now.

Turning to other issues, the prior Acting Secretary's decision in *Graham & Rollins* also raises serious procedural and fairness concerns. To restate a portion of the Board's discussion from the D. & O.:

> Thus, H-2B enforcement proceedings can involve serious accusations of wrongdoing and steep remedies. If H-2B enforcement proceedings like these are not made and decided "on the record," then each case "could be decided on the basis of evidence that a court would never see or, what is worse, that a court could not be sure existed." Congress cannot have intended such a result and the proposition that an agency could bring enforcement actions and sanctions against an employer, or any other entity, in a hearing type forum without concurrently creating a record of those proceedings for the purposes of subsequent review by another body is absurd. The time of the King's Star Chamber is long past. Yet this is the logical result of the FAD's reasoning. Instead, we think it is safe and imminently reasonable to conclude, in line with nearly 80 years of precedent and legal presumptions, and in line with common sense, that Congress intended to apply the

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[29] D. & O. at 45-47.

[30] Opposition at 13-14.

> panoply of procedural protections provided by the APA to these quasi-judicial adjudications.[31]

We note that the Administrator's Opposition fails to address this concern that not requiring a hearing on the record could unfairly leave an employer exposed to arbitrary, unrecorded treatment by the Administrator and, as a practical matter, deny the ability to appeal the result of enforcement proceedings. Such an outcome could not have been intended by Congress.[32] Contrary to the legislative-type hearing where the outcome is prospective and widely applicable, or the less formal adjudicatory proceedings such as licensing that would not be covered under EAJA, the imposition of civil monetary penalties is the type of individualized, quasi-judicial adjudication which requires fact-finding on the basis of a record.[33]

Further, the Administrator asserts that applying EAJA to H-2B enforcement proceedings "would have a significant negative impact on the Department's enforcement of the H-2B program."[34] The Administrator also asserts that the Board's decision would:

> require the Department to expend resources in cases in which it does not ultimately prevail on all claims because the Administrator would have to defend its positions as substantially justified under EAJA. Defensive litigation on these grounds will divert already limited resources from the Department's proactive enforcement priorities, which are vital to protecting the American workforce. . . . [T]he Department would be forced to use resources to defend against those claims rather than directing its efforts towards enforcement against those who violate the law.[35]

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31 D. & O. at 48-49 (citations omitted).

32 We recognize that such proceedings normally are held on the record by the agency. *See Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 20 & n.80. But the risk that such proceedings would not be held on the record exists under Acting Secretary Su's decision.

33 *See* D. & O. at 54-58 (Burrell, J., concurring) (stating that courts reviewing agency action required agencies provide notice, disclose evidence, allow for cross-examination, and base decisions on the record at hearing).

34 Opposition at 14.

35 *Id.* at 15.

This argument is effectively an attack on the purpose and structure of EAJA. The Act necessarily *strikes a balance* between an agency's zealous enforcement of the statutes it is charged to enforce and the *also* important need to protect small entities from overzealous prosecution given their limited resources to defend themselves. Both are important societal goals and neither trumps the other. Speaking more directly: this is obviously what EAJA is all about, and obviously Congress contemplated there would be litigation expenses for agencies under EAJA.

Further, it should again be emphasized that the Administrator's burden to justify why it pursued a case in which it ultimately did not prevail is hardly a heavy one, as explained in the Board's D. & O.[36] Indeed, evidence shows that the Administrator's concern is overstated, because very few EAJA petitions are successfully filed against the Department, at least as documented by the Administrative Conference of the United (ACUS).[37] As a prime example, the ARB in *Graham & Rollins* found that the Administrator's (losing) position was "substantially justified."[38]

In essence, the defenses an agency can assert ensure that only the most frivolous cases are going to be subject to an EAJA award. This deters (to some degree) agencies bringing questionable cases against a small entity to begin with. Rather than undermining enforcement, this result helps incentivize the agency to carefully look at the cases before bringing the power of the agency against a small employer. This will result in better screening of cases and, in fact, a better allocation of limited enforcement resources to be used against true violators.

As was noted by the American Conservative Union in referring to legislation that would eliminate the defense of "substantial justification":

> This legislation modernizes this important protection [from EAJA] against baseless actions taken against law abiding Americans by their own government.

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[36] D. & O. at 28 n.114.

[37] ACUS reports that since 2019, there has only been **one** EAJA award against the Department of Labor in "adversary adjudications." EAJA AWARDS DATA: TABLES AND STATISTICS, https://www.acus.gov/eaja/statistics (last visited May 12, 2026).

[38] *Graham & Rollins (ARB)*, ARB No. 2021-0047, slip op. at 23-36.

> **Some within the government will attempt to say this legislation will cost too much. This is simply not the case.** When EAJA was originally enacted, estimations placed the cost to the federal government at $500 million annually. The actual cost for the first 13 years (FY82 - FY94) was reported by the GAO to be a TOTAL of $34.1 million.
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> EAJA in fact forces the federal government to cost the taxpayer LESS money. **A reduction in frivolous federal actions will be caused** when the general counsel of an initiating agency is forced to weigh the likelihood of success against the loss of the defendants' costs from their own operating budget – the same consideration that anyone else filing suit must face.[39]

We also agree with Morton Concessions that the issue begs for resolution given the stakes for the H-2B employment community. Based on data published by the Department of Labor, Morton Concessions asserts that more than 17,000 employers participated in the H-2B program in fiscal year 2025.[40] It also asserts that more than a decade ago, the Department estimated that employers' costs to

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39 *Equal Access to Justice Reform Act of 2005: Hearing Before the Subcomm. on Courts, the Internet, & Intell. Prop., Comm. on the Judiciary*, House of Representatives, 109th Cong. 111 (2006) (letter of J. William Lauderback, Executive Vice President, The American Conservative Union) (emphasis added). Of course, while not common, it is certainly not unusual to have statutory mandates overlap and sometimes conflict, creating a situation that decisionmakers must resolve. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002), for example, the Supreme Court addressed the conflict between the National Labor Relations Act and the Immigration Reform and Control Act of 1986 (IRCA), finding that the purposes of the IRCA to deter the illegal hiring of undocumented workers overrode concerns of the National Labor Relations Board (NLRB) as to the weakening of its enforcement powers, with the NLRB arguing it should have the power to award backpay to an undocumented worker fired for union organizing activity. Quoting a prior decision, the Court stated: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives." *Hoffman Plastic Compounds*, 535 U.S. at 143 (quoting *S. S.S. Co. v. Nat'l Lab. Rels. Bd.*, 316 U.S. 31, 47 (1942)). In the instant case, however, it can be argued, as the American Conservative Union pointed out, that adherence to EAJA can in fact *promote* more rational enforcement of the underlying statute.

40 Petition at 7 (citation omitted).

comply with H-2B program regulations was $1.2 billion over 10 years.[41] Morton Concessions asserts that, therefore, "[w]hen deciding whether to hire H-2B workers, how to comply with H-2B regulations, or choosing litigation defense strategies, H-2B employers need the certitude that they will not be subjected to unjustifiable WHD prosecution."[42] Given the stakes, we agree, and encourage the Secretary to agree as well.

CONCLUSION

For the foregoing reasons, the Board has unanimously voted to **REFER** this matter to the Secretary.

RANDEL K. JOHNSON
Chief Administrative Appeals Judge

ELLIOT M. KAPLAN
Administrative Appeals Judge

THOMAS H. BURRELL
Administrative Appeals Judge

PHILIP G. KIKO
Administrative Appeals Judge

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41 *Id.* at 7-8 (citation omitted).

42 *Id.* at 8.